No. 13,969

IN THE

United States Court of Appeals

For the Ninth Circuit

LEO WING ON and LEO WING WAH,
Appellants,

vs.

J. HOWARD MCGRATH, Attorney General of the United States,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANTS' OPENING BRIEF.

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APPELLANTS' OPENING BRIEF.

This is an appeal from an order entered in the District Court, for the Northern District of California, Southern Division, on June 3, 1953, dismissing appellant's* action.

The appellant filed his complaint, seeking a declaratory judgment to determine the facts of paternity and of his United States citizenship, and which said action was commenced in accordance with the provision of Section 503 of the Nationality Act of 1940 (54 Stat. 1171, 8 U.S.C.A. 903).

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*Both appellants are referred to as "appellant" throughout.

Jurisdiction of this Court to review the order of the trial Court arises by virtue of 28 U.S.C.A. 1291.

STATEMENT OF FACTS.

The appellant filed his complaint to establish the fact of paternity and of being a citizen of the United States on March 4, 1952. The appellee filed his answer to said complaint on May 13, 1952.

Thereafter, on the 11th day of December, 1952, counsel for the appellant filed a motion to substitute Herbert Brownell, Jr., in the place and stead of J. Howard McGrath as Attorney General of the United States. Whereupon the appellee filed a motion seeking to dismiss the cause and right of action on the ground that the substitution was not made timely in compliance with Rule 25 (d) of the Federal Rules of Civil Procedure. The Court, with the Hon. J. Harris sitting, heard oral argument, and examined written briefs, which were submitted by both appellee and appellant, and issued an order, allowing the appellant's motion to substitute the named Attorney General, as prayed for in appellant's motion on January 19, 1953.

Appellant thereafter set this action for trial, by the consent of Court, for the 7th day of May, 1953. Thereafter, and upon request and at the instance of the appellee, a stipulation was entered into by counsel for appellant and appellee, to continue the hearing for the 20th day of July, 1953. The appellee thereupon filed a

motion to dismiss the appellant's action on the 25th day of May, 1953, on the grounds that the action abated under the Rule 25 (d) of the Federal Rules of Civil Procedure.

The Hon. Judge Murphy, after hearing argument oral and written, thereupon vacated the order of Judge Harris and dismissed appellant's action on June 3, 1953.

STATEMENT OF POINTS ON APPEAL.

(1) The Court below erred in holding that the appellant's cause of action abated;

(2) The Court below erred in holding that the appellant's right of action abated;

(3) The Court below erred in vacating the order of a court of parallel jurisdiction.

ARGUMENT.

The axiom *"actio personalis moritur cum persona"* was the prevailing influence of the common law system of jurisprudence. In the actions *ex delicto,* the cause of action and the right to bring the action both abated with the death of the plaintiff. The actions *ex contractu* did not suffer such a hard fate, but the right to bring the action only abated, and this was limited, if the nature of the relief was such that the executor or heirs might perform, if the duties or liabilities were not of a personal nature.

These seemingly harsh principles were necessary for ending litigation, at early common law, but have since been modified by statute to meet the exigencies of a later system of economy.

Lord Campbell Act, 20 and 21 Vict. C. 83.

The question involved herein to be determined is whether the true party in interest named in the plaintiff's complaint as defendant is the Sovereign United States and the Attorney General, or J. Howard McGrath, *in propria persona.*

The cases of this type and character now before this Court are clearly not *ex delicto,* and although apparently veering toward the action *ex contractu,* fall in that peculiar agreement between a sovereign and his subjects, which are *sui generis* in nature, in that they are usually a claim for rights or privileges having as their incidence the generosity of the sovereign to his subjects.

In the instant case, the remedy as asked for in the appellant's prayer, is that of determining the fact of a filial relationship to a citizen of the United States and of a consequential decree of the Court declaring the appellant to be a citizen and national of the United States. Now this distinctive remedy, sought by the appellant, can be granted only by the sovereign, the United States; and therefore the United States is the true party in interest as party defendant.

The character of appellant's pleading herein, and the caption of the pleadings are identical and compa-

rable in all respects to that of the *Ly Shew* case, where Judge Goodman held:

> "Although the action is brought against the Attorney General, it is in fact an action against the United States."
>
> *Ly Shew as guardian ad litem for Ly Moon v. Dean Acheson as Secretary of State,* Civil No. 30,159.

It is appellant's contention that a removal of party defendant expressly named hereinabove as party defendant would have no entry in the scope and principle of abatement, since the nature of the action is neither *ex contractu* nor *ex delicto,* and hence does not fall into the category of actions known to common law, wherein a speedy determination of litigation was a primary factor in maintaining the King's peace.

To the contrary, the counsel for the Attorney General contends that compliance with Rule 25 (d) is the sole determining factor of whether or not an action is abated, and that where the Attorney General, named *in propria persona,* and as *persona descripto,* is removed from office, the action is deemed for all purposes abated unless the substitution of party defendant is made in compliance with Rule 25 (d).

The Attorney General contends that Rule 25 (d) has not been complied with, and that the particular action should therefore be dismissed, or again the Attorney General contends that the motion of the appellant to

substitute party defendant was not made timely and that the action abated.

Appellant contends that the purpose of Rule 25 (d), Act of February 13, 1925 (28 U.S.C., Sec. 780), originally enacted in 1899, was for the purpose of avoiding the harsh results suffered by litigants, under the early common law rules of pleading, where a party to an action *ex contractu* or *ex delicto* was removed by death or other causes, and further, we are not concerned with Rule 25 (d) inasmuch as the substitution of a party under Rule 25 (d) was evolved out of the "Bill in the nature of a bill of revivor, and founded upon privity of title." Story Equity Pleading, §§ 378-380.

It is strongly urged by the appellant that we are not concerned with the question of removal of a person named as party defendant inasmuch as an examination of the caption of the appellant's complaint, will show that the defendant is named and described, to wit, "J. Howard McGrath, Attorney General of the United States, Washington, D.C., defendant."

The jurisdiction is directed to the Attorney General of the United States, and not to that particular person acting in that capacity.

8 U.S.C.A. 903, Sec. 503, Nationality Act 1940.

The name therefore is mere surplusage.

The mere examination of appellant's petition, the caption, the complaint, the prayers, and the source from whence the relief and remedy shall be granted should determine the true party in interest, and the decree of the Court requires no positive action of the

Attorney General. There is no personal action, and on the contrary all that is required of the defendant Attorney General is "non-feasance".

Appellant again contends that the United States permits itself to be sued; hence it divests itself of the immunity of the sovereign, and the removal of an officer would not have the effect of abating the action.

Thompson v. United States, 103 U.S. 480;
Federal Housing Administration v. Burr, 309 U.S. 242, 249-50.

The United States District Court for Hawaii, in reviewing an action, similar in form, content, parties, pleadings and remedy, held that an action of this type was an action against the United States, and that that Sovereign granted the subject a limited jurisdiction to sue, and that the true party in interest was the United States, and that the equitable doctrine of laches did not apply.

Ishikawa v. Attorney General, 90 Fed. Supp. 713.

The appellant contends that this action is one founded upon the largess and generosity of the Sovereign and is founded upon principles of equity, and therefore the ruling in the *Ishikawa v. Attorney General* matter, following the doctrine of laches is compatible and on point in the instant action.

Appellant argues further that the need for substitution is one of form and is of no importance, with the possibility of keeping the record straight.

We are required to speak of the Attorney General of the United States only inasmuch as that is suffi-

cient to designate that particular branch of the executive office of the President of the United States. A statement of the Attorney General's name in this type of action is a humble courtesy offered to the dignified person of the office of Attorney General.

The United States District Court held in *Fleming v. Goodwin,* 165 F. (2d) 334:

> "The purpose is merely to keep the record straight."

In *contradistinction,* actions *ex delicto,* or *ex contractu,* brought against an officer or agent of the United States usually require an act *in propria persona,* to wit: the signing of a pay-check, or a release of personal property, and lastly, the most personal act of all, the signature of a judge, affixed to a judgment.

In the instant action, the Attorney General is required to do nothing. A decree of a trial Court shall determine the fact of paternity of the plaintiff, and if so, citizenship follows as a result thereof by act of Congress.

United States Revised Statutes, Section 1993.

The remaining question that appellant sets forth as an error: A judge of the District Court may vacate an interlocutory order if in the interests of justice the ends of proper relief may be best served to the parties.

Appellant does not attempt to enter into the question of the right or power of a Court of inferior jurisdiction to vacate an order of a Court of parallel jurisdiction, but rather whether or not the action of the inferior Court in the instant matter was proper under

the all prevailing circumstance to set aside an order of an inferior Court of equal jurisdiction on the identical matter. The appellee relies on *Bowles v. Wilkie,* 175 F. 2d 35, wherein the Government's motion to substitute was vacated by a Court of parallel jurisdiction, but where there were neither briefs submitted nor oral argument presented to the Court.

Bowles v. Wilkie is distinguishable from the case at bar in that the trial judge of the Court heard argument, points and authorities by both counsels for appellant and respondent and *amicus curiae,* and after hearing oral argument and pleadings, the trial Court ruled for the appellant. That further and thereafter the same questions, arguments, persons, cases and briefs were again presented and heard by the second trial Court of parallel jurisdiction and in contradistinction to the facts in the *Bowles v. Wilkie,* supra, the Court vacated the order of the prior trial Court.

Again appellant submits the doctrine of *res judicata,* or the law of the case, and in the absence of a statute these principles will not be ignored, unless there is a showing of error.

This principle was approved in *Hamilton-Brown Shoe Co. v. Wolfe Bros. & Co.,* 240 U.S. 259:

> "The Supreme Court, in rendering a final decree on certiorari may rectify errors in interlocutory proceedings, et seq."

After dismissal of appellant's action, appellant filed a motion to set for trial in a third Court of parallel jurisdiction, and after presenting a new set of facts based upon the ruling of

Sophie Pflueger v. Tom C. Clark, Civil Action in Equity No. 47 C. 1707, U.S. Dist. Ct., N.D. of Illinois, E.D.,

wherein there was a stipulation between counsel for plaintiff and defendants with consent of Court for a continuance, similar to the facts of appellant's case at bar; and upon a hearing after briefs were submitted and oral argument was made on the question of jurisdiction, the trial Court, Judge Carter presiding, held that it would not set aside or vacate the order of dismissal of a Court of parallel jurisdiction.

Leo Wing On v. Brownell, Civil No. 31,316, N.D. Calif., S.D.

The appellant therefore concludes that the Sovereign United States is the true party defendant; that the axiom, "*Actio personalis moritur cum persona,*" is not applicable, since the Sovereign still lives, and so does this action; that Rule 25(d) is therefore not applicable.

Further, that the order vacating the order of a Court of parallel jurisdiction was improper.

The appellant therefore submits to this Honorable Court that the order of dismissal of the trial Court be set aside.

Dated, San Francisco, California,
November 9, 1953.

Respectfully submitted,
SALVATORE C. J. FUSCO,
Attorney for Appellants.